

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY  
11/16/2001

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FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2001-000128

Docket Code 512

FILED: \_\_\_\_\_

WILLIAM GEORGE JACHIMEK

CHRISTOPHER A CASERTA

v.

STATE OF ARIZONA

JAMES H HAYS

PHX CITY MUNICIPAL COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5975510

Charge:    1. FAILURE TO PAY PAWNBROKER TRANSACTION FEE  
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This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Phoenix Municipal Court and the memoranda submitted by counsel.

Appellant prosecuted Appellee for six violations of Phoenix City Ordinance No. G-4131, which requires all pawnbrokers to pay a fee of \$3.00 for each reportable transaction form filed with the City as required by Arizona Revised Statute § 44-1625(A). At trial, Appellee raised two defenses: that the fee was actually an unconstitutional tax and that the state legislature has preempted the city from regulating the activities of pawnbrokers. The trial court held that the ordinance was an unconstitutional tax and was preempted by the state legislature and dismissed all charges. The State appealed and alleges that the trial court erred and that the ordinance imposes a lawful, regulatory fee upon pawnbrokers rather than a tax. Appellant further alleges that state law has not preempted the city's ability to regulate pawnbroker activities.

## **1. Standard of Review**

The issues in this case concern preemption by a state statute and the constitutionality of a city ordinance. In matters of preemption, the standard of review is *de novo*.<sup>1</sup> Appellate courts must also review the constitutionality of an ordinance *de novo*.<sup>2</sup> The appellate court must assume the ordinance is constitutional.<sup>3</sup> Only if an ordinance is arbitrary and capricious may the courts interfere with local legislation.<sup>4</sup> The party presenting the challenge has the burden of overcoming this presumption.<sup>5</sup>

## **2. Preemption**

Appellant alleges that state law does not preempt the City of Phoenix's ordinance providing for the collection of a pawnbroker transaction fee. In order to preempt local government, state law must already fully occupy the field

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<sup>1</sup> *City of Tucson v. Rineer*, 193 Ariz. 160, 162, 971 P.2d 207 (App. 1998). *See also* *Kadish v. Arizona State Land Dep't*, 177 Ariz. 322, 868 P.2d 335 (App. 1993).

<sup>2</sup> 193 Ariz. at 164. *See also* *City of Tucson v. Grezaffi*, 347 Ariz. Adv. Rep. 10 (App. 2001).

<sup>3</sup> 193 Ariz. at 164.

<sup>4</sup> *City of Glendale v. White*, 67 Ariz. 231, 238, 194 P.2d 435, 439 (1948).

<sup>5</sup> 193 Ariz. at 164.

in question.<sup>6</sup> The mere fact that the state legislature has enacted a regulatory scheme does not mean the state has preempted the field.<sup>7</sup> Instead, preemption is found where the local ordinance and state statute are in conflict<sup>8</sup> and the state legislature has clearly expressed its intention to preempt.<sup>9</sup>

For the statute and ordinance to be in conflict, there must be more than that both laws "touch upon a common element."<sup>10</sup> Conflict exists only if the two laws are inconsistent.<sup>11</sup> There is no preemption if the two laws "are capable of 'peaceful coexistence.'"<sup>12</sup> Additionally, the local ordinance may be more restrictive than the state law.<sup>13</sup>

There is no clear inconsistency between the state laws regulating pawnbrokers and Phoenix Ordinance No. G-4131. The state laws<sup>14</sup> regulate some aspects of pawnbrokers' businesses. They include provisions that pawnbrokers must register with local county sheriffs,<sup>15</sup> that local police may inspect their records,<sup>16</sup> and that they must submit reports to the police for each shop transaction.<sup>17</sup> The statutes also provide that pawnbrokers must pay certain fees in conjunction with their initial and continued operation<sup>18</sup> and delineate which costs may be passed on to their customers.<sup>19</sup> The City Ordinance simply requires that a fee be paid in conjunction with the report required by state law and outlines how and when this fee is to be paid.<sup>20</sup> Nowhere in the state laws is there a similar, conflicting fee requirement or a mandate that local government may not charge such fees.

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<sup>6</sup> *Union Transportes de Nogales v. The City of Nogales*, 195 Ariz. 166, 171, 985 P.2d 1025 (1999).

<sup>7</sup> 193 Ariz. at 163 [*quoting Kadera v. Superior Court*, 187 Ariz. 557, 560, 931 P.2d 1067, 1070 (App. 1996)].

<sup>8</sup> *Id.*

<sup>9</sup> *Jett v. City of Tucson*, 180 Ariz. 115, 121, 882 P.2d 426, 432 (1994).

<sup>10</sup> *State v. McLamb*, 188 Ariz. 1, 4, 932 P.2d 266, 269 (App. 1996).

<sup>11</sup> *Babes Cabaret v. City of Scottsdale*, 197 Ariz. 98, 104, 3 P.3d 1018 (App. 1999) (*quoting City of Prescott v. Town of Chino Valley*, 163 Ariz. 608, 616, 790 P.2d 263, 271 (App. 1989)).

<sup>12</sup> *Id.*

<sup>13</sup> *Tucson v. Consumers for Retail Choice*, 197 Ariz. 600, 603, 5 P.2d 935 (App. 2000) (*citing City of Phoenix v. Breuninger*, 50 Ariz. 372, 378, 72 P.2d 580, 583 (1937)).

<sup>14</sup> ARIZ. REV. STAT. §§ 44-1621 *et. seq.*

<sup>15</sup> ARIZ. REV. STAT. § 44-1627(A).

<sup>16</sup> ARIZ. REV. STAT. § 44-1624(G).

<sup>17</sup> ARIZ. REV. STAT. § 44-1625.

<sup>18</sup> ARIZ. REV. STAT. § 44-1626.

<sup>19</sup> *Id.*

<sup>20</sup> Ordinance No. G-4131.

The language of Arizona Revised Statute § 44-1626(B)(6) also tends to support the proposition that there is no conflict between the statute and the ordinance. Appellee alleges that this statute was a response to the Brady Bill enacted three months earlier and does not allow the City's transaction fee. As Appellant points out, however, the state legislature amended Arizona Revised Statute § 44-1626(B)(6) in 2000, two years after the City ordinance went into effect, to specify that all reportable transaction fees charged to pawnbrokers by government agencies may be recouped by passing on the cost to customers.<sup>21</sup> Far from there being a conflict, the state legislature appears to have clarified the language of the statute to ensure that there is not a conflict with local ordinances.

Even where there is no conflict between state and local laws, however, preemption may occur where the state legislature has clearly expressed an intent to preempt.<sup>22</sup> Appellee argues that because the state law specifically allows the city to regulate pawnbrokers' hours of operation, all other local regulation is barred.<sup>23</sup> However, preemption occurs only where the legislature has expressed a clear intent to prohibit local regulation.<sup>24</sup> Preemption is not found via a process of "negative inference,"<sup>25</sup> as would be necessary in order to find preemption based upon the fact that the state has explicitly stated that local government may regulate pawnbrokers' hours of operations.

The legislative history of the pawnbroker statutes also does not give rise to a clear expression of an intent to preempt. As Appellee discusses at length, the state legislature has considered granting regulatory powers over pawnbrokers to local governments on several occasions, but each time has removed such language before passing the legislation in question.<sup>26</sup> This action is not, however, a clear and explicit denial of regulatory power to local government. On the contrary, it is equally plausible that the state legislature removed this language because local government already had this regulatory power and the legislature felt it would be superfluous to include it.

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<sup>21</sup> Appellant's Memorandum at pp. 9-10.

<sup>22</sup> See supra note 9.

<sup>23</sup> Appellee's Memorandum at p. 11 and n. 15.

<sup>24</sup> 197 Ariz. at 102 [quoting *Jett v. City of Tucson*, 180 Ariz. 115, 121, 882 P.2d 426, 432 (1994)]; *City of Tucson v. Rineer*, 193 Ariz. 160, 163, 971 P.2d 207 (App. 1998).

<sup>25</sup> 193 Ariz. at 162.

<sup>26</sup> Appellee's Memorandum at pp. 12-14.

Legislation typically does not include superfluous or redundant provisions.<sup>27</sup> Additionally, the fact that city and county government have a wide variety of regulatory powers over pawnbrokers under both the pawnbroker statutes and other ordinances<sup>28</sup> gives rise to the inference that local government may regulate any matter the state statute does not explicitly bar. This is not the case here. The state pawnbroker statutes do not explicitly preempt local regulation and do not conflict with the City's ordinance. This Court finds no preemption.

### **3. Constitutionality of Statute**

The trial court also held that the payment authorized by the ordinance is an unconstitutional tax because it is clearly not a user fee.<sup>29</sup> The distinction between a tax and a fee as made by the courts is clear and is one upon which Appellant and Appellee appear to agree. A tax is involuntary, if required and the payor does not receive a comparable service in return, and is assessed solely upon ability to pay.<sup>30</sup> It is typically levied in order to obtain general revenue and any direct benefit to the payor is incidental.<sup>31</sup> A fee is a voluntary payment by a narrow segment of society, made in exchange for services by a public officer.<sup>32</sup> The fee is paid only when the service is requested and in exchange for a direct benefit to the payor.<sup>33</sup> Appellant cites case law and secondary authorities distinguishing between a regulatory fee and a user fee.<sup>34</sup> A user fee is assessed by an owner in exchange for use of property or services whereas a regulatory fee is a charge for the regulation of a business under a government's police powers.<sup>35</sup>

Appellant argues that the charge authorized by Ordinance G-4131 is not a tax because it is voluntary. Appellee, however, states that it is not voluntary because, if pawnbrokers do not want to pay the charge, they face either

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<sup>27</sup> *Vega v Morris*, 184 Ariz. 461,463, 910 P.2d 6 (1996).

<sup>28</sup> *See* 197 Ariz. at 102 (noting that even where state preemption exists local government still may make laws regulating a business, such as zoning, health, and building codes).

<sup>29</sup> Final Memorandum of Decision, at p. 6.

<sup>30</sup> *National Cable Television Assn. v. United States*, 415 U.S. 336, 340, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974); *Stewart v. Verde River Irr. & Power Dist.*, 49 Ariz. 531, 544-45, 68 P.2d 329 (1937).

<sup>31</sup> *Weller v. City of Phoenix*, 39 Ariz. 148, 151, 258 P. 648 (1931).

<sup>32</sup> 415 U.S. at 340-41, 49 Ariz. at 545.

<sup>33</sup> 49 Ariz. at 545.

<sup>34</sup> Appellant's Memorandum at 11; Appellant's Reply at pp. 3-4.

<sup>35</sup> Appellant's Reply at pp. 3-4.

finances and sanctions for noncompliance or being barred from pursuing their chosen occupation.<sup>36</sup> In *National Cable Television Association v. U.S.*<sup>37</sup> the United States Supreme Court clearly stated that this is not the test for voluntariness. The choice of participating in a regulated occupation (here, being a pawnbroker) is the voluntary act.<sup>38</sup> Once an individual or entity has chosen this occupation, he has implicitly agreed to pay all of the fees associated with being a member of that occupation. Appellee has chosen to be a pawnbroker, and therefore has chosen to pay all fees associated with that occupation.

The charge in question also fails to be classified as a tax based upon the "ability to pay" element. The definition of a tax explicitly states that is premised upon the ability to pay.<sup>39</sup> Appellee does not argue that the charge assessed under Ordinance G-4131 similarly varies based upon the payor's ability. The fee is fixed and does not vary.

Finally, Appellant alleges that any benefit society derives from the pawnbrokers' payment of this charge is incidental. Appellee argues that the charge directly benefits society, as the fee covers all costs of the pawnbroker supervision unit of the police department, including investigation of criminal activities uncovered from pawn shop reports. The trial court erred because, like Appellee, it confused the benefit conferred by the payment of the fee under the ordinance with the benefit conferred by the filing of the transaction reports required by statute.

Under state law, pawnbrokers must file transaction reports and the Sheriff or his designee must process them.<sup>40</sup> These reports confer a direct benefit upon society because they allow police to detect stolen property. They do not confer any benefit upon the pawnbrokers. The charge required by Ordinance G-4131 provides no direct benefit to society. Any information concerning stolen merchandise is contained in the transaction report required under state law, not in the fee and accompanying form required under the ordinance. Instead, the fee covers the cost of regulating the pawnbrokers and thus the pawnbrokers are the direct beneficiaries of the fee.

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<sup>36</sup> Appellee's Memorandum at p. 5.

<sup>37</sup> *Supra*.

<sup>38</sup> 415 U.S. at 340.

<sup>39</sup> *See supra* note 31 & accompanying text.

<sup>40</sup> ARIZ. REV. STAT. § 44-1625.

This Court finds that the charge required by Ordinance G-4131 is a constitutional regulatory fee. This Court finds further that state legislation has not preempted Ordinance G-4131.

IT IS THEREFORE ORDERED reversing the ruling of the Phoenix Municipal Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix Municipal Court for all further and future proceedings.